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Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

MAR 11 2004

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re **CS Docket No. 98-120**  
**Carriage of the Transmissions of Digital**  
**Television Stations**

Dear Ms. Dortch:

This office represents Entravision Holdings, LLC ("Entravision")

On March 10, 2004, Mr. Walter F. Ulloa, the Chairman and Chief Executive Officer of Entravision, and the undersigned met with Chairman Michael K. Powell and Mr. Jonathan P. Cody of the Office of Chairman Powell. On that same day, Mr. Ulloa and the undersigned also met with Commissioner Kathleen Q. Abernathy, Commissioner Michael Copps and Mr. Jordan Goldstein of the Office of Commissioner Copps, and Commissioner Jonathan S. Adelstein and Ms. Johanna Mikes Shelton of the Office of Commissioner Adelstein.

In each of the meetings, Mr. Ulloa addressed the above-referenced rulemaking proceeding in general, and in particular, the matter of whether the Commission should apply its must-carry rules to cable carriage of multiple streams of broadcast signals by digital television stations. Mr. Ulloa expressed his concern that the imposition of a must-carry requirement by the Commission could result, owing to statutory and Constitutional questions, in the elimination of must-carry obligations on the part of cable operators. Such a result would, in the opinion of Mr. Ulloa, be detrimental to over-the-air broadcasters. In the meetings, Entravision supplied a copy of the attached Position Paper that has previously been submitted as an *ex parte* filing in the instant proceeding.

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Ms. Marlene H. Dortch

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In accordance with Section 4.1206(b)(2) we are filing two copies of this Notice

Respectfully submitted

A handwritten signature in black ink, appearing to read "Barry A. Friedman". The signature is stylized with a large, prominent "B" and "F".

Barry A. Friedman

cc Mr. Walter F. Ulloa  
Chairman Michael K. Powell  
Commissioner Kathleen Q. Abernathy  
Commissioner Michael C. Capps  
Commissioner Jonathan S. Adelstein

## **WHY THE COMMISSION SHOULD NOT PROMULGATE A DIGITAL MULTICAST MUST-CARRY REQUIREMENT AT THIS TIME GIVEN THE HARM SUCH A DECISION COULD INFLICT ON INDEPENDENT BROADCASTERS**

Entravision Holdings LLC, the licensee of broadcast television stations featuring Spanish-language programming, argues herein that given the possibility of a successful constitutional challenge to a Commission decision granting broadcasters must-carry rights for their multicast digital programming services, which could result in the scaling back or total removal of existing must-carry rights, the Commission should not promulgate a digital multicast must-carry requirement at this time. The loss of existing must-carry rights would devastate independent broadcasters and possibly lead to the disappearance of such independent voices from the television marketplace. Such harm to independent broadcasters outweighs any benefit accruing primarily to network-affiliated stations from digital multicasting and counsels against granting broadcasters must-carry rights for digital multicast programming.

### **INTRODUCTION**

In the current battle over mandatory carriage rights for the digital multicast programming services of television broadcast stations, the voice of independent broadcasters has been drowned out by network-affiliated broadcasters advocating for such rights, and cable operators opposing them on constitutional grounds. While desirous of multicasting rights, Entravision, an independent broadcaster of Spanish-language programming provided by the Univision Network, which owns and operates 42 primary television stations (of which 17 are full-service television stations) located generally in small and medium-sized television markets in the southwestern United States, is concerned as to the potential impact of this battle on a more pressing fundamental issue for it and other independent broadcasters: the preservation of must-carry rights on cable television systems. Entravision urges the Commission to consider how the current fight for multicast must-carry presents independent broadcasters with little to gain and much to lose. Accordingly, Entravision requests that the Commission affirm the conclusion it has already reached to grant must-carry rights only to a television station's single primary feed of digital programming. *See Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120, *First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 2598, 2622

(2001) (*First Report and Order*) (concluding that "primary video" means a single programming stream and that if a digital broadcaster elects to divide its spectrum into multiple programming streams only one can be considered "primary" and entitled to mandatory carriage)

Network-affiliated broadcasters have characterized multicast services as an integral component of the future business plans of broadcasters and as indispensable to a successful DTV transition and the continuing vitality of free over-the-air television service. However, while digital multicast services may already be a reality for some network affiliates with the programming and financial resources to advance and support such technology, independent stations simply do not have access to the programming or the capital to invest in such technology at this time or in the foreseeable future. The costs of the DTV transition itself, without regard to the development of multicast services, has imposed an enormous financial burden on television broadcasters in general and small broadcasters in particular. Entravision, for one, has spent considerable resources simply getting its digital stations up and running, and as a practical matter does not have the funds or access to programming to take meaningful advantage of developing multicast technologies. Thus, Entravision, and other similarly situated independent broadcasters, presently have little to gain from a multicast must-carry requirement.

On the other hand, given the certainty that cable operators will bring a constitutional action against multicast must-carry,<sup>1</sup> and challenge the underlying foundations of must-carry in the process,<sup>2</sup> independent broadcasters have much to lose from the Commission's pursuit of a

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<sup>1</sup> See Ex Parte Letter from National Cable & Telecommunications Association, CS Docket No. 98-120 (Nov. 24, 2003) ("NCTA Letter") (outlining constitutional claims against multicast must-carry requirement).

<sup>2</sup> See Ex Parte Letter from Comcast Corporation, CS Docket No. 98-120 (Oct. 16, 2003) ("Comcast Letter") (arguing that intervening factual developments since the Supreme Court upheld must-carry regulations have fatally weakened the rationale relied upon by the Court).

digital multicast must-carry requirement. If in response to a suit by cable operators the courts scale back or do away with existing must-carry rules, it is the independent stations, and not network affiliates, that will bear the brunt of such a decision. While affiliates will continue to have their analog and multiple digital feeds carried on cable through retransmission consent agreements, owing to cable's need to offer network programming, independent stations that have always depended upon mandatory carriage to reach their target audiences will be devastated by the loss of their must-carry rights. The programming that independent stations currently offer will, in all likelihood, become programming product that affiliates can use on their multiple channels, which cable operators will be obligated to carry. Owing to the value of the underlying network-affiliated channels that resulted in retransmission consent authority for the affiliates.<sup>3</sup> Without must-carry, the presence of locally-oriented and diverse independent broadcasters in the television marketplace will rapidly decline, leaving only the major network affiliates with their general market orientation. As for the audiences of those independent broadcasters, such as Entravision's Spanish-speaking viewers, they will no longer be served by broadcasters attuned to their special needs and interests.

Accordingly, Entravision submits that the key to a successful DTV transition does not lie in promoting digital multicast services at this time, but rather in ensuring that the investments all broadcasters have made to date in their analog and digital stations are not in any way

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<sup>3</sup> Retransmission consent has always been the vehicle whereby network affiliates have promoted their weak non-network program offerings on cable. See Ex Parte Letter from National Cable & Telecommunications Association, CS Docket No. 98-120 (Dec. 15, 2003) (referencing broadcast networks' leverage to compel carriage of broadcast-owned cable networks) (citing US General Accounting Office Report to the Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, *Telecommunications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry* (Oct. 2003) at 27-29 (finding that of the 90 most carried cable networks, 43 percent were majority-owned by broadcast networks)).

jeopardized. Independent broadcasters, having made significant capital investments, should not now have them placed at risk. The key to a successful DTV transition lies in a digital must-carry regime that guarantees the future carriage of the primary broadcast feed of all broadcasters' digital signals on each and every cable system operating in each station's television market. *See First Report and Order, supra*. Guaranteeing the continued future carriage of all digital stations on all market cable systems will truly ensure that all digital broadcasters, and not just network affiliates, can recoup their investments in the DTV transition through access to all cable households in their markets. This, in turn, will advance the DTV transition, foster localism, and promote the goals underpinning the Commission's must-carry regulations: to preserve the benefits of free over-the-air broadcast television and to promote competition and the widespread dissemination of information for a multiplicity of sources. *See Cable Television Consumer Protection and Competition Act of 1992 (P.L. No. 102-385, 106 Stat. 1460) (the "1992 Cable Act"); Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997).

#### **I. CABLE OPERATORS' OPPOSITION TO MULTICAST MUST-CARRY**

In response to the Commission's consideration of a multicast must-carry requirement, cable operators have threatened to bring First Amendment and Fifth Amendment claims against any policy interpreting "primary video" as used in the 1992 Cable Act, to mean more than one video stream. *See, e.g.,* NCTA Letter, *supra*. Whatever the precise merits of cable operators' claims, it is clear that the multicast must-carry requirement under consideration by the Commission raises constitutional questions, which may be of a different cast and possibly more convincing to the Courts than in the past.

As a legal matter, the Commission should avoid interpreting statutory language in a manner that calls into question the constitutionality of Congress's directives. *See Jones v. United*

*States*, 529 U.S. 848–851 (2000) (“constitutionally doubtful constructions should be avoided where possible.”) Moreover, as a policy matter, the stakes are simply too high for the Commission to push the constitutional limits of must-carry by adopting a multicast must-carry requirement at this time. Does the Commission really wish to risk a situation in which its promotion of digital must-carry results in no must-carry treatment at all?

In a constitutional challenge to multicast must-carry, Entravision submits that cable will not limit their opposition to the obligation to carry multiple program feeds of a television station that do not relate to the Station’s primary video service. Instead, cable operators will seize upon the opportunity to characterize the foundation for existing must-carry regulations as outdated, given the multiplicity of program delivery services, and seek to have must-carry as it now stands nullified by the Supreme Court, a result the cable television industry has long been anxious to achieve. *See Comcast Letter, supra*. As previously recognized by the National Association of Broadcasters, “the stations that cannot reach voluntary carriage agreements are the ones in the most need of must-carry’s access to the audience to build their DTV futures.” Reply Comments of NAB/MSTV/ATV, CS Docket No. 98-120, at 11 (Aug. 16, 2001) (“NAB Reply Comments”). In other words, without must-carry, network affiliates will continue to survive and prosper by means of retransmission consent of their programming, while independent broadcasters, with their diverse voices, will begin to disappear from the marketplace. This result would obviously be counter to the goals of localism and a multiplicity of voices that underpin the Commission’s must-carry regulations,<sup>4</sup> inform many of the Commission’s initiatives,<sup>5</sup> and were of paramount concern to Congress and the public during the Commission’s broadcast ownership proceedings.<sup>6</sup>

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<sup>4</sup> *See Turner, supra*.

The Commission should now shore up the foundations of must-carry by casting its digital must-carry policy in terms of the primary broadcast feed of all digital stations, thereby maintaining the standard of ensuring that the primary signal of an analog television station is carried on cable systems in the station's television market. By adopting a digital policy that does not risk jeopardizing must-carry for all broadcasters, the Commission will reaffirm the central importance of localism and a diversity of voices to the broadcast television service. And by shoring up the foundations of must-carry by confirming that all that is intended is to ensure that the primary signal of all local broadcasters can be seen on all local cable systems, rather than pushing its boundaries by promoting multicasting, the Commission will better serve not only its must-carry goals but also the DTV transition.

## **II. MULTICASTING IS NOT THE KEY TO A SUCCESSFUL DTV TRANSITION AND THE PRESERVATION OF FREE OVER-THE-AIR BROADCAST TELEVISION**

Network affiliates have characterized multicasting as digital television's future and as the means to unlock a video market dominated by cable. Accordingly, these network broadcasters characterize multicast carriage as the key to a vital, competitive video programming industry. See e.g., Special Factual Submission by the CBS Television Network Affiliates Association in Support of Multicast Carriage Requirement, CS Docket No. 98-120, at 13-16 (Jan. 13, 2004) ("CBS Submission"). Entravision disagrees. The possibilities and potential benefits associated with multicasting are realistically available only to vertically-integrated media giants and large group owners of the four major networks' affiliated stations with ample resources to secure programming and invest in multicasting technology. The costs of the DTV transition have left

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<sup>5</sup> See "FCC Chairman Powell Launches 'Localism in Broadcasting' Initiative," FCC News Release, August 20, 2003 ("*Localism in Broadcasting Initiative*").

<sup>6</sup> As noted by Jerrold Starr, director of Citizens for Independent Public Broadcasting, it is often the case that "primary stations and large market stations" have less of a connection with their community." Communications Daily, Sept. 10, 2003, at 5.



most independent broadcasters financially strapped.<sup>7</sup> Broadcasters such as Entravision cannot hope to take advantage of multicasting until their investments in their digital stations are secured and the stations begin to operate at a profit.<sup>8</sup> In the meantime, multicasting will simply increase the power of network-affiliated stations and further diminish the ability of independent broadcasters to make their voices heard. A multicast must-carry requirement would effectively allow network affiliates to dominate the local broadcast station industry, and lead to the kind of homogenous video programming market that informed the concerns of Congress and the public during the Commission's broadcast ownership proceedings.

Entravision submits that the values underpinning must-carry call for a strong digital must-carry policy that broadly benefits all digital stations, rather than a narrow, controversial must-carry policy that helps only those stations that least need it.<sup>9</sup> Carriage of the primary

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<sup>7</sup> Broadcasters can expect to spend between three and ten million dollars per station to convert to digital operations, based upon the need for new towers, modifications of existing towers, new transmission lines, antennae, digital transmitters and encoder, consultants, licensing, and related capital expenditures. *See Regarding the Transition to Digital Television: Hearings Before the House Comm. on Energy and Commerce, Subcomm. On Telecomm. and the Internet*, 107<sup>th</sup> Cong. 38 (2002). All in all, it is estimated that broadcasters will spend between ten and sixteen billion dollars before the DTV transition is complete. *See FCC Seeks More Detail on DTV Transition from Industry Players*, Public Broadcasting Report, May 30, 2003, at Latest News.

<sup>8</sup> The problem of how to make DTV operations profitable is longstanding and widespread throughout the broadcast industry, and multicasting presents the latest version of this problem. *See* Edmund Sanders, *TV Firms Split Over 'Multicasting'*, L.A. Times, Dec. 14, 2003, at C1 (discussing how broadcaster's DTV investments have yet to pay off and how broadcaster have yet to figure out how to recoup higher costs of multicasting).

<sup>9</sup> Among commercial broadcast television stations, multicasting efforts are almost exclusively being undertaken by network-affiliated stations. *See TV Firms Splitting Over 'Multicasting'*, *supra* (discussing multicasting efforts of CBS and Fox affiliates), John Eggerton and Ken Kerchbaumer, *Suddenly It's Hip to Spectrum-Split*, Broadcasting & Cable, Dec. 8, 2003, at 1 (discussing multicasting plans of ABC and NBC). *See also* CBS Submission, *supra*, Special Factual Submission in Support of Multicasting Carriage by the NBC Affiliates Television Association, CS Docket No. 98-120 (Jan. 8, 2004), Ex Parte Letter from National Broadcasting Company, CS Docket No. 98-120 (Nov. 7, 2003), Ex Parte Notice from ABC

programming associated with a digital station's signal rather than multicast must-carry, will promote localism and a multiplicity of sources in the broadcast television service. Further, digital must-carry that ensures that broadcasters have their primary broadcast service carried on all cable systems in their markets will advance the DTV transition for everyone, not just the network affiliates.

**III. A DIGITAL MUST-CARRY POLICY REQUIRING CARRIAGE OF THE PRIMARY PROGRAM FEED OF ALL DIGITAL STATIONS WILL BEST PROMOTE THE COMMISSION'S MUST-CARRY GOALS AND ADVANCE THE DTV TRANSITION**

Free over-the-air television remains an important part of the video programming market. Millions of consumers still rely on over-the-air signals for television viewing, particularly minority viewers and viewers with lower incomes. *See* NAB Reply Comments at 21-22. With cable serving as the gatekeeper to nearly 70% of the homes in America, carriage on cable systems remains central to the economic viability of independent stations. *See Regarding the Transition to Digital Television supra*. Thus, cable carriage is intricately linked to television stations' ability to succeed and to continue providing service to non-cable homes. Moreover, cable carriage is uniquely important to specialty stations such as Entravision's that need must-carry in order to reach their target audiences.

Stations such as Entravision's lack the mass audience appeal necessary in order to secure retransmission consent agreements with cable operators, and thus, must-carry is the only means by which these stations can deliver their programming through cable operators to the bulk of their intended audiences. *See* NAB Reply Comments at 24-25. Despite the absence of a mass audience, Entravision's stations provide genuine service to the Spanish-speaking public. The

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Television Affiliates, CS Docket No. 98-120 (Jan. 12, 2004); Ex Parte Letter from ABC, Inc., CS Docket No. 98-120 (Nov. 20, 2003).

bulk of Entravision's full-service stations, and a number of its low-power stations, originate local news, a program service that many of Entravision's English-language competitors are abandoning. These local Spanish-language news services are the only source of in-depth news and information about government actions and emergencies for Spanish-speakers in markets where there are no Spanish-language newspapers and where radio news is usually limited and, too often, non-existent.

Entravision believes that if must-carry did not exist, many of its stations would have to rely only on over-the-air transmissions to reach their viewers, a nearly impossible result in this day of multiple multichannel video providers. If that were the case, Entravision would not have the revenues to originate local news and provide other services to its local communities. The preservation of a must-carry policy, encompassing the primary video stream of digital television, is thus critical to the continuing survival of digital stations without network affiliations.

#### **A. LOCALISM AND A MULTIPLICITY OF SOURCES**

Without must-carry, independent stations will not survive in the television marketplace. The loss of these stations will simply increase the market concentration of network-affiliated stations and cable operators at the expense of localism and a diversity of voices. Such an outcome obviously contradicts the Commission's *Localism in Broadcasting Initiative* and the values expressed by Congress and the public during the Commission's broadcast ownership proceedings, the same values that underpin the Commission's must-carry regulations. Given the importance of must-carry to independent stations, and the importance of independent stations to a vibrant, diverse video programming market, the Commission should not pursue a multicast must-carry policy that places mandatory cable carriage of independent broadcasters in jeopardy.

at this time. A multicast must-carry requirement would not only fail to promote the principles animating must-carry, but could actually undermine must-carry altogether by prompting a constitutional challenge by cable operators aimed not just at multicasting, but at the foundations of must-carry.

## **B. THE DTV TRANSITION**

A strong digital must-carry policy is also indispensable to the success of the DTV transition. As previously mentioned, cable operators currently serve approximately 70% of the television households in the United States. *See Regarding the Transition to Digital Television, supra*. As recognized in a recent report on the DTV transition by the General Accounting Office, “[b]ecause more than two-thirds of Americans receive their television via cable, cable carriage of DTV broadcast signals is important for facilitating the transition.” United States General Accounting Office, GAO-03-7, *Telecommunications: Additional Federal Efforts Could Help Advance Digital Television Transition* 4 (2002). Access to homes served by cable, and the advertising revenue that accompanies such access, are the kind of financial incentives independent television broadcasters such as Entravision need to undertake the transition from analog to digital operations. A strong digital must-carry policy will encourage wide participation in the DTV transition, and accelerate its successful completion. Whereas a multicast must-carry requirement would only benefit the large, well-funded network affiliates, a primary feed-based digital must-carry policy will assure a successful DTV transition for all stations.

Further, by promulgating a multicast must-carry requirement, and provoking cable operators to litigate the constitutionality of such a policy, the Commission could actually set back the DTV transition. A lengthy court battle would certainly delay the transition. More

significantly if such a battle ended in the scaling back or the complete repeal of must-carry, the DTV investments of broadcasters such as Entravision would be lost. Such an upset to the DTV futures of independent stations would deal a commensurate blow to the DTV transition and to independent broadcasting itself. Once again Entravision submits that, at present, the stakes are too high for the Commission to push the must-carry envelope. For the time being, the Commission should concentrate on a must-carry policy that ensures that the primary feed DTV signal of all local broadcast stations is carried on all cable systems in their markets at the earliest possible time.

### **CONCLUSION**

Digital multicasting represents an exciting opportunity for well-positioned broadcasters to expand their services, but, as such, it represents the icing on the cake rather than the heart of the matter. Mandatory carriage of the primary signal of all digital television stations will promote localism and a true diversity of voices, which remain the real benefits of free over-the-air television. This is the heart of the matter. The Commission's top priority should be to secure must-carry rights for the primary broadcast feed of all digital stations. Policies that threaten to delay or otherwise prevent the achievement of this goal should not be advanced at this time. Given cable operators' credible threats to bring constitutional claims against a multicast must-carry policy, and to challenge the continuing validity of constitutional grounds for existing must-carry regulations in such a proceeding, the Commission's current consideration of multicast must-carry is at odds with the values that underpin must-carry as well as the Commission's DTV transition goals and localism initiatives. Entravision submits that the Commission should focus on a digital must-carry regime that, like current must-carry regulations, centers upon mandatory carriage by cable operators of the primary program feed associated with a station's broadcasts.

Accordingly, Entravision urges that the Commission affirm its conclusion that digital must-carry should extend only to “primary video,” as more fully set forth in the *First Report and Order*, *supra*